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CRIMINAL LAW ISSUES

WHEDON v. STATE, No. 49S00-0009-CR-540, ___ N.E.2d ___ (Ind. Apr. 16, 2002).
DICKSON. J.

Our cases do not provide a conclusive resolution regarding whether the rule requiring express prohibition of imprisonment for non-payment of fines applies equally to costs.

. . . .

Although we note that most of our prior decisions primarily involved the imposition of fines, we have indicated our approval of the same sentencing language requirement for court costs as well. [Citation omitted.] Furthermore, our legislature requires indigency hearings both as to the imposition of fines, Ind.Code ' 35-38-1-18(a), and costs, Ind.Code ' 33-19-2-3(a). We conclude that when fines or costs are imposed upon an indigent defendant, such a person may not be imprisoned for failure to pay the fines or costs.

We note, however, the dubious origin of the rule declaring that trial courts' sentencing orders must necessarily recite an express prohibition upon imprisonment for failure to pay fines or costs. Remanding to insist that this warning be included in every order sentencing an indigent defendant does not substantially serve defendants or the just and efficient administration of justice. Moreover, a defendant's financial resources are more appropriately determined not at the time of initial sentencing but at the conclusion of incarceration, thus allowing consideration of whether the defendant may have accumulated assets through inheritance or otherwise. Finding the supporting precedents insufficiently grounded and the rule lacking sound and substantial purpose, we overrule our precedents declaring that that sentencing orders must include the prohibition against imprisonment for failure to pay fines or costs.

SHEPARD, C. J., and BOEHM, RUCKER, and SULLIVAN, JJ., concurred.

ORTIZ v. STATE, No. 71S00-0002-CR-73, ___ N.E.2d ___ (Ind. Apr. 22, 2002).
RUCKER, J.

Although the State must prove territorial jurisdiction beyond a reasonable doubt, that does not necessarily mean that a defendant is entitled to a jury instruction on the issue. This point was made clear in McKinney v. State, 553 N.E.2d 860 (Ind. Ct. App. 1990). . . . The Court held A[b]ecause the prosecution must prove territorial jurisdiction, the issue must be submitted to the jury unless the court determines no reasonable jury could fail to find territorial jurisdiction beyond a reasonable doubt.@ Id. at 863-64. Another way to make the same point, and the position this Court endorses today, is that if there is no serious evidentiary dispute that the trial court has territorial jurisdiction, then a special instruction on territorial jurisdiction need not be given to the jury.

SHEPARD, C. J., and BOEHM, DICKSON, and SULLIVAN, JJ., concurred.

CLAY v. STATE, No. 79A02-0107-CR-488, ___ N.E.2d ___ (Ind. Ct. App. Apr. 11, 2002).

MATHIAS, J.

The instruction at issue reflects Indiana Pattern Jury Instruction 2.01(a), which reads in pertinent part as follows:

> The crime of attempted murder is defined as follows: A person attempts to commit a murder when, acting with the conscious purpose of killing another person, he engages in conduct that constitutes a substantial step toward killing that person.
>
> To convict the Defendant of attempted murder, the State must have proved each of the following elements:
>
> The Defendant:
>
> 1. acting with the conscious purpose of killing [name victim]
> 2. did [set out conduct charged as substantial step]
> 3. which was conduct constituting a substantial step toward the commission of the intended crime of killing [name victim].

Ind. Pattern Jury Instruction (Criminal) 2.01(a) (2nd ed. 1991 & Supp. 1999). In the comments to the pattern jury instruction, the drafters acknowledged our supreme court's decision in Spradlin and stated:

> [t]o avoid confusing the statutory culpability term "intentionally" with other senses of "intent," the preceding instruction uses the "conscious purpose" statutory definition of "intentionally" rather than the term "intentionally" itself.

Id. [Footnote omitted.]

Recently, this court suggested that parties dealing with this issue refer to this pattern instruction because of the "continuing confusion over how to properly instruct a jury with regard to attempted murder." Booker v. State, 741 N.E.2d 748, 754 n.7 (Ind. Ct. App. 2000). However, our supreme court has suggested that a more straightforward version of this instruction might read, "the defendant, acting with intent to kill a human being, did . . . ." Williams v. State, 735 N.E.2d 785, 789 n.4 (Ind. 2000).

> . . . We hold that the meaning of the phrase "conscious purpose" is equivalent to the mens rea of "specific intent." For this reason, the use of the phrase "conscious purpose" in an attempted murder instruction does not constitute fundamental error [Footnote 6 appears as follows: But see Hopkins v. State, 747 N.E.2d 598, 609 (Ind. Ct. App. 2001), trans. denied, where another panel of our court determined that the trial court adequately instructed the jury with regard to specific intent "even if the trial court improperly added the phrase 'conscious purpose'" because it has the same meaning as "specific intent" and informs the jury that the State must prove that the defendant intended to kill the victim.] [Footnote 7 appears as follows: However, while we have determined that it is not fundamental error to use the phrase "conscious purpose," confusion and needless appeals could be avoided if courts would use the phrase "specific intent," which is consistent with the Spradlin decision, or "acting with intent to kill a human being" under Williams, when instructing juries.]

BROOK, C. J., and RILEY, J., concurred.

LIKE v. STATE, No. 63A01-0105-CR-179, ___ N.E.2d ___ (Ind. Ct. App. Apr. 16, 2002).

BROOK, C. J.

We consider the State's petition for rehearing in which it argues that we erred in concluding that the trial court abused its discretion in imposing a $125.00 criminal costs fee under Indiana Code Section 33-19-5-1(a). *See Like v. State*, 760 N.E.2d 1188, 1193 (Ind. Ct. App. 2002). Indiana Code Section 33-19-5-1(a) provides that "[f]or each action that results *in a felony conviction* under IC 35-50-2 … the clerk shall collect from the defendant a criminal costs fee of one hundred twenty dollars ($120)." (Emphasis added.) In our opinion, we noted that

Like was convicted of a Class B felony under Indiana Code Section 35-48-4-2(a), not under Indiana Code 35-50-2, and vacated the portion of the trial court's order imposing a $125.00 criminal costs fee. *See Like*, 760 N.E.2d at 1193.

The State acknowledges that a defendant cannot be convicted of a felony under Indiana Code 35-50-2, which governs felony sentencing provisions, but contends that the "spirit of the statute" requires a trial court to impose the fee when a defendant has been convicted of a felony. We agree with the State's contention but nevertheless conclude that the trial court abused its discretion in imposing a fee in excess of the statutory limit of $120.00. We therefore grant the State's petition for rehearing and remand with instructions to impose a criminal costs fee in the amount of $120.00.

Petition for rehearing granted and remanded with instructions.

MATHIAS, J., concurs.

RILEY, J., would deny rehearing

LAKE COUNTY CLERK'S OFFICE v. SMITH, No. 45S00-0102-CV-105, ___ N.E.2d ___ (Ind. Apr. 22, 2002).

RUCKER, J.

. . . Bondsmen challenge Indiana's statutory bail scheme only under the disparate treatment prong [of the Indiana Constitution's Privileges and Immunities Clause]. Similar to their equal protection challenge, they contend that the scheme creates different classes and that the differences between the classes do not justify subjecting only bail agents to late surrender fees.

We first observe that it could be argued that bail agents are treated better under Indiana's statutory bail scheme than defendants who post ten percent cash bonds. With respect to forfeiture, if a defendant who posts a ten percent cash bond fails to appear, the court orders the full amount of the bond forfeited. I.C. § 35-33-8-7(b). This is so even if the defendant later appears as ordered by the court. In contrast, bail agents have a 365-day window in which to produce the defendant before the court even orders forfeiture. I.C. § 27-10-2-12(d). With respect to late surrender fees, even though bail agents and defendants who post ten percent cash bonds are treated differently, the outcome for bail agents is the same or better. For example, if a defendant who posts a ten percent cash bond fails to appear, although he is not subject to late surrender fees, he forfeits 100% of the bond. I.C. § 35-33-8-7(b). Likewise, if a defendant who uses a bail agent fails to appear and the bail agent is unable to surrender him within 365 days, the bail agent must pay 100% of the bond, 80% in late surrender fees and 20% in forfeiture fees. I.C. § 27-10-2-12(c)(5), (d). However, if the bail agent is able to prove within 365 days that the defendant's appearance was prevented by a statutory reason, the bail agent is not subject to any late surrender fees. I.C. § 27-10-2-12(b), (c). And even if the bail agent is unable to prove within 365 days that the defendant's appearance was prevented by a statutory reason, the most he must pay in late surrender fees is 80% of the bond. I.C. § 27-10-2-12(c).

In any event Bondsmen are correct that the scheme creates different classes. Those classes are bail agents who post bail bonds on behalf of defendants for profit and defendants who post ten percent cash bonds on their own behalf. And Bondsmen are also correct that bail agents and defendants who post ten percent cash bonds are treated differently. This is so, however, because without the threat of late surrender fees, bail agents have no incentive to ensure a defendant's appearance because they get to keep the entire premium regardless of whether the defendant appears.

We conclude that any disparate treatment between bail agents and defendants who post ten percent cash bonds is reasonably related to the inherent characteristics between the two unequally treated classes. As with their equal protection claim, Bondsmen have failed to carry their burden of proving that Indiana's statutory bail scheme violates Article I, Section 23 of the Indiana Constitution.

SHEPARD, C. J., and BOEHM, DICKSON, and SULLIVAN, JJ., concurred.

STATE v. HAWKINS, No. 49A02-0110-CR-668, ___ N.E.2d ___ (Ind. Ct. App. Apr. 23, 2002).

GARRARD, Senior Judge

On the evening of November 11, 2000 police stopped an automobile driven by Hawkins because one of its headlights was out. Officer Harper went up to explain why he had stopped the car. As he was speaking to Hawkins, the sole occupant, he noticed the strong smell of burnt marijuana in the car. Harper waited for backup to arrive and then requested Hawkins to get out of his car. The backup, Officer Baker, then searched the car and discovered a loaded Glock handgun under the driver's seat. When Hawkins admitted he did not have a permit for the gun but denied owning the gun, the officers placed him under arrest.

. . . .

Although three Indiana decisions have suggested that smell alone might establish probable cause, all have stopped short of deciding the question. . . .

. . . .

Considering the stipulated facts and the numerous decisions from other jurisdictions, we have no hesitation in deciding that when a trained and experienced police officer detects the strong and distinctive odor of burnt marijuana coming from a vehicle, the officer has probable cause to search the vehicle. That is true under both the Fourth Amendment of our federal constitution and under Article 1, Section 11 of the Indiana Constitution.

MATTINGLY-MAY and VAIDIK, JJ., concurred.

CIVIL LAW ISSUES

MATTER OF COURTHOUSE SECURITY IN TIPPECANOE COUNTY, No. 79S0109-MF-405, ___ N.E.2d ___, (Ind. Apr. 12, 2002).

Per Curiam

Indiana Trial Rule 60.5 establishes procedures by which intra-county disagreements about court funding may be resolved. We have also held that the procedures of that rule apply to orders of mandate relating to things other than court funding. *See Board of Comm'rs of Crawford County v. Riddle*, 493 N.E.2d 461, 462 (Ind. 1986). In this instance, those procedures have been invoked in a dispute about courthouse security in Tippecanoe County.

The Tippecanoe County Courthouse is used predominantly for court-related functions. Perhaps as many as a thousand people enter and leave the courthouse on a daily basis. Incidents over the past several years have made courthouse security a topic of concern in Tippecanoe County.[1] Certain courthouse security measures were implemented by the Board of Commissioners of Tippecanoe County and the Tippecanoe County Council (collectively, "Commissioners"). However, the Honorable Ronald E. Melichar, Judge of the Tippecanoe Circuit Court, disagreed with the adequacy of the Commissioners' plan.

When efforts toward a negotiated settlement of the dispute surrounding courthouse security failed, Judge Melichar issued an order of mandate expressly directing how access to the courthouse should be controlled, including instructions on how many entrances to the courthouse should be kept open and who should be permitted to bypass security.

As provided in Trial Rule 60.5, we appointed a special judge to conduct a trial on the

[1] Security is a concern universal to all Indiana governmental officials. In response to these concerns, in 1994 we issued an order approving security guidelines and priorities for Indiana judges and courts. *See* Cause No. 95S00-9411-MS-1103.

merits of the mandate order. After the trial, the special judge entered a final decree documenting his fact-finding and conclusions. The decree does not become effective until reviewed by the Supreme Court unless that review is waived. Ind. Trial Rule 60.5(B). The Commissioners declined to waive review and in due course the matter was fully briefed before this Court.

The special judge's decree overturned and modified the mandate order in significant part, concluding that some of Judge Melichar's directives exceeded his authority.[2] That decree is the subject of our review.

The decree provides that so long as proper security is placed at each open entrance, the number of entrances is a matter for the Commissioners to decide. The decree notes that the county Sheriff is primarily responsible for preserving order in the courthouse. *See* Ind. Code § 36-2-13-5(a)(6). The decree states that each entrance with public access shall have a metal detector through which persons entering the courthouse shall pass. The decree further notes that it is the responsibility of the Sheriff to supervise his deputies, to determine whether additional security measures should be employed, and to create special rules for the transportation of prisoners and for the screening of governmental employees.

In sum, the special judge's decree directs that metal detectors and security staff be put in place at as many public entrances to the courthouse as the Commissioners think appropriate to keep open. The operation and management of those security points is noted as being the responsibility of the Sheriff. We would expect that the Sheriff would continue to work, as always, with the local judiciary to understand and address their particularized security concerns.

While this case was being briefed, the Commissioners were granted leave to supplement the record with documents demonstrating that they have now voluntarily complied with the decree. The Commissioners closed six of the eight entrances to the courthouse, installed x-ray screening equipment at both entrances, and allocated funding for five additional bailiffs to assist with entrance security. These developments would seem to render moot any controversy between the parties. The Commissioners nevertheless assert that review by this Court is still warranted because: (1) the case involves separation of powers issues of great public importance; and (2) the decree lacks the flexibility necessary to account for future changes in circumstances. We address this latter issue first.

The mandate decree already incorporates a reasonable degree of flexibility. Moreover, we perceive no reason why the decree might not be subject to modification if warranted by changed circumstances. The appointment of the special judge was made pursuant to Trial Rules 60.5 and 79(K). Trial Rule 79(L) gives the special judge continuing jurisdiction over this matter.

As to the former point, separation of powers issues can be weighty and courthouse security is an important topic. However, we see no out-of-the-ordinary separation of powers issues in need of resolution here. As in every case of this nature, the central issues are whether a mandate is reasonably necessary for the operation of the court or court-related functions and if so, are any specific fiscal or other governmental interests so severely and adversely affected as to require that the order be set aside. *Morgan Circuit Court v. Morgan County Council*, 550 N.E.2d 1303, 1304 (Ind. 1990). On review, we will sustain the judgment if it is supported by substantial evidence of probative value. *Id.*

In this instance, the Commissioners have demonstrated that compliance with the decree is fiscally achievable without adverse consequences. We presume that since they took these measures on their own initiative, they ultimately concluded that these steps were reasonably necessary. The cooperation and attention given to the issue of security by the Commissioners have mooted the need for more detailed review of the special judge's decree. As already noted, the special judge retains jurisdiction to act on motion from either party. We also affirm the unchallenged directives of the special judge regarding the payment of attorneys fees in this case.

All Justices concur.

ST. VINCENT HOSP. and HEALTH CARE CENTER, INC. v. STEELE, No. 34S02-0107-CV-329, ___ N.E.2d ___ (Ind. Apr. 22, 2002).

RUCKER, J.

We grant transfer to resolve a conflict of authority in the Court of Appeals concerning Indiana's Wage Payment Statute. We conclude the statute governs both the frequency and amount an employer must pay its employee.

. . . .

[2] Seven judges work in the Tippecanoe County Courthouse. The original order of mandate overturned in part by the special judge in this case was prepared and signed by only one of those judges. We are reluctant to adopt a *per se* rule requiring that a majority of the judges in a county agree to any mandate order of collective interest to the local judiciary. However, in order to avoid the potential for conflicting mandate orders or unwelcome control over the courtrooms of other judges by one judge, that would be the preferred approach in situations where, as here, the operation of the entire county judiciary is affected.

Dr. Steele filed a complaint against St. Vincent alleging breach of contract for failure to pay the full amount of compensation due under the terms of the agreement and for violation of Indiana's Wage Payment Statute. He subsequently filed a motion for summary judgment, and St. Vincent filed a cross-motion contending that it could not pay the full amount due under the terms of the agreement because of the proposed federal regulation and thus there was no violation of the Wage Payment Statute. Ruling that St. Vincent breached the agreement and violated the statute, the trial court entered summary judgment in favor of Dr. Steele. . . . .

. . .Acknowledging the conflict of authority on the issue, the Court of Appeals affirmed the trial court ruling that the statute governs both the frequency and amount an employer must pay its employee. St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele, 742 N.E.2d 1029, 1035 (Ind. Ct. App. 2001). St. Vincent seeks transfer. [Footnote omitted.] Although we reach the same conclusion as the Court of Appeals, we grant transfer to resolve the conflicting opinions on the question of whether the Wage Payment Statute governs both the frequency and amount an employer must pay its employee.

. . . .

Indiana Code section 22-2-5-1 provides that an employer "shall pay each employee at least semimonthly or biweekly, if requested, the amount due the employee." I.C. ' 22-2-5-1(a) (emphasis added). This section later provides that "[p]ayment shall be made for all wages earned to a date not more than ten (10) days prior to the date of payment." [Citation omitted.] . . . In our view, the plain, ordinary, and usual meaning of the phrases "all wages" and "amount due" unambiguously establishes that the legislature intended the Wage Payment Statute to govern not only the frequency but also the amount an employer must pay its employee. To conclude otherwise would be to read out of the statute that which clearly exists. [Footnote omitted.]

SULLIVAN, J., concurred.

DICKSON, J., concurred in the result without filing a separate written opinion.

SHEPARD, C. J., filed a separate written opinion in which he concurred, in part, as follows:

I write separately to observe that the reason treble damages can be imposed on the employer in this case is that the court ultimately determined that the employer's grounds for reducing its payments to the employee were legally unavailing. Thus, the holding of this case is that the full amount of the employee"s earnings were the "amount due him" under the statute. Had the employer's grounds for withholding a part of the employee's wages been upheld, then the employer would have already paid the full "amount due" and treble damages would not be available.

BOEHM, J., filed a separate written opinion in which he concurred, in part, as follows:

. . A statute providing one party with treble damages and attorney's fees is a very substantial deterrent to an employer's playing fast and loose with wage obligations. As applied to claims of most workers this is very understandable legislative policy. But the "employee" who earns mid six figures should be able to fend for himself or herself, and there seems to me to be no reason to tip the balance of settlement value of any dispute so dramatically against the employer. . . .I write simply to point out what seems to me to be an unnecessary and perhaps unfair skewing of the negotiation as applied to highly compensated executives and professionals.

P. T. BARNUM'S NIGHTCLUB v. DUHAMELL, No. 49A02-0107-CV-481, ___ N.E.2d ___ (Ind. Ct. App. Apr. 23, 2002).

KIRSCH, J.

The Club contends that Duhamell's counsel violated Rule of Professional Conduct 4.2 by contacting Lobosco, the Club's former employee and general manager. Duhamell maintains that Rule 4.2 does not prohibit ex parte contact with former employees. Rule 4.2 provides:

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

. . . .

We join with the majority of jurisdictions that have analyzed this issue and hold that Indiana's Rule 4.2 does not prohibit an attorney from contacting the former employee of a party adverse to the attorney's client in litigation. In reaching this decision, we are guided primarily by the text of the Rule, which refers only to communication with "a party." Former employees such as Lobosco are clearly not "parties" to the litigation. The Comment then clarifies who qualifies as a "party" in the case of a corporate party. Like the Committee, we find it persuasive that the Comment delineates certain classes of employees to which the Rule applies. No language in the Comment suggests that the Rule should even be applied to all current employees—much less former employees.

In so holding, we recognize the danger that allowing such contacts creates and are mindful of the limitations some courts have imposed to address these dangers. We are particularly troubled by the possibility that ex parte interviews could lead to the disclosure of information protected by the attorney-client privilege. While Rule 4.4 prohibits an attorney from inducing anyone to violate an attorney-client privilege, it does not reach the situation where the disclosure of such privileged communication was inadvertent and unsolicited. However, we find no language in Rule 4.2

suggesting any limitations on contact with former employees. Recognizing the drawbacks of Rule 4.2 as applied in this situation, our supreme court with its rule-making authority may wish to revisit this issue. Until then, we hold that Rule 4.2 contains no limitations on the contacts an attorney may make with the former employee of an adverse party. Accordingly, the trial court did not err in denying the Club's motion to strike the Lobosco affidavit.

. . .

SULLIVAN, J., filed a separate written opinion in which he concurred, in part, as follows:

I am in total agreement with the majority opinion in that it holds that any result other than that reached would in effect rewrite the Rule itself. I nevertheless share the majority=s concern about certain possibilities which would involve disclosure of information protected by an attorney-client privilege. . . .

Again, however, this is a call best left to our Supreme Court.

ROBB, J., filed a separate written opinion in which she concurred, in part, as follows:

I believe the communication between Duhamell's counsel and Lobosco was appropriate and therefore Lobosco's affidavit was properly gathered and the trial court properly denied the Club's motion to strike. I therefore concur in Part I of the majority decision with the caveat that it should not be construed in the future to sanction allowing a substantive claim under the Rules of Professional Conduct in anything other than a disciplinary proceeding. In all other respects, I concur with the majority opinion.

ZIMMERMAN v. HANKS, No. 77A04-0106-CV-266, __ N.E.2d __ (Apr. 24, 2002).

SHARPNACK, J.

William K. Zimmerrman appeals the small claims court's order dismissing his complaint for failure to prosecute. Zimmerman raises two issues, which we restate as:

1. Whether the small claims court erred when it denied Zimmerman's motion for appointment of counsel pursuant to Ind. Code § 34-10-1-2 [footnote omitted]; and
2. Whether the small claims court denied Zimmerman his constitutional right to bring a civil action.

We reverse and remand for specific findings.

The relevant facts follow. While incarcerated at the Wabash Valley Correctional Facility ("WVCF"), Zimmerman, pro se, filed a small claims action against employees of the Department of Correction ("DOC") for allegedly confiscating and destroying his personal property. Zimmerman, pro se, filed a motion for relief from fees in civil actions, pursuant to Ind. Code § 33-19-3-2 [footnote omitted], accompanied with a statement of exceptional circumstances ("Statement"). The Statement provided, in pertinent part, that Zimmerman has

> been absolutely indigent and without any funds since July, 1998 . . . [and his] prison trust fund account currently has over $300.00 in liens for photocopies made at the prison law library – and postage liens; and . . . approximately $1,500.00 in liens against [it] for federal civil action filing fees and appellate fees.

Appellant's Appendix at 9. The small claims court granted Zimmerman's motion for relief from fees and waived all filing fees and court costs associated with the small claims action. The small claims court also notified Zimmerman that his trial and any hearings would be conducted via video-conferencing between the court and WVCF.

Subsequently, the DOC transferred Zimmerman from WVCF to Indiana State Prison in Michigan City. On January 31, 2001, Zimmerman, pro se, filed a motion for an order to transport him from Indiana State Prison to the small claims court for trial. However, the small claims court denied the transport order. On February 21, 2001, Zimmerman, pro se, filed a motion for appointment of counsel pursuant to Ind. Code § 34-10-1-2, which the court also denied. On March 2, 2001, Zimmerman, pro se, filed a motion to reconsider the denial of his motion for appointment of counsel wherein he requested that the small claims court either: (1) appoint counsel to represent him pursuant to Ind. Code § 34-10-1-2; (2) appoint a guardian ad litem to represent his interests in the small claims action; or (3) arrange for Zimmerman to appear at all hearings and trial via telephonic conference. The small claims court denied Zimmerman's motion to reconsider. Finally, on March 21, 2001, the small claims court dismissed Zimmerman's cause of action because Zimmerman "fail[ed] to appear" at the scheduled bench trial. Id. at 33.

. . . .

[S]ince Zimmerman filed his Appellant's Brief, our supreme court vacated Sholes I. Sholes v. Sholes, 760 N.E.2d 156 (Ind. 2001). In Sholes, the supreme court set out a procedure for appointing civil counsel under Ind. Code § 34-10-1-2. See id. at 160. To invoke Ind. Code § 34-10-1-2, the litigant must apply to the trial court for leave to proceed as an indigent person. Id. When confronted with such a motion, the trial court should first determine whether the applicant is indigent and is without sufficient means to litigate the action. Id. An affirmative finding on both inquiries would result in a statutory mandate that counsel be appointed. Id. at 166.

However, as the Sholes court cautiously warned, while the considerations of indigence and sufficient means are similar in some situations, they are not identical. Id. at 161. Rather, for purposes of Ind. Code § 34-10-1-2, the two inquiries are quite different. Id. To determine whether an applicant is indigent, for example, the trial court must balance the applicant's assets against his liabilities and consider the amount of the applicant's disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations. Id. By contrast, the determination of whether an "applicant has 'sufficient means' goes beyond a mere snapshot of the applicant's financial status. Rather, the [trial] court must examine the applicant's status in relation to the type of action before it." Id. Thus, if the action is of the type that is often handled without the presence or assistance of counsel by persons who are not indigent, such as many small claims actions, the trial court may find that even an indigent applicant has "sufficient means" to proceed without appointed counsel. Id. at 161. However, there is not a "blanket [category] of cases in which counsel should never be appointed. Rather, the [trial] court should look to the particular issues presented in the action and make a determination of whether the indigent applicant requires appointed counsel." Id.

If the trial court establishes that the applicant is indigent and is without sufficient means to prosecute or defend the action, its inquiry regarding whether to appoint counsel is not over. Rather, because trial courts have only a statutory directive to appoint counsel to indigent litigants in civil cases, the trial court must further determine "whether [the applicant] has a colorable bona fide dispute over issues warranting the expense of counsel." Id. at 166. . . . Thus, even if the tri applicant, "the trial court [has] to consider whether it has the power, under Ind. Trial Rule 60.5, [footnote omitted] to order payment of counsel, or whether the statutory mandate of [Ind. Code § 34-10-1-2] fails in light of overriding considerations that would prevent expenditure of public funds for appointed counsel." Id. at 166.

. . .Here, the small claims court found Zimmerman indigent by virtue of its order waiving filing fees and court costs. . . .[W]e must reverse the small claims court's dismissal of Zimmerman's cause of action and remand with instructions to: (1) vacate all proceedings conducted after Zimmerman's motion for appointment of counsel; (2) determine whether Zimmerman has sufficient means to prosecute his small claims action; and (3) if not, determine whether counsel may be appointed to represent Zimmerman consistent with Ind. Trial Rule 60.5. See, e.g., id. at 166..

. . .Because we reverse the small claims court's denial of Zimmerman's motion for appointment of counsel, we need not determine whether the court's actions in denying Zimmerman's motions for a transport order and appointment of counsel denied Zimmerman his constitutional right. However, given that this issue may arise again on remand, we make the following observations regarding the relevant law.

A prisoner, such as Zimmerman, who brings a civil lawsuit has no right to a transport order. . . .

. . . .

. . .[A] prisoner does have a constitutional right to bring a civil action. . . .[I]mplicit in this right to bring a civil action is the right to present one's claim to the trial court.

Here, the small claims court originally told Zimmerman that he could appear at the small claims trial via video conferencing from WVCF. Subsequently, however, the DOC transferred

Zimmerman from WVCF to the Indiana State Prison in Michigan City. Thus, in both his motion for appointment of counsel and motion to reconsider, Zimmerman requested video or telephonic conferencing or the appointment of a guardian ad litem to represent his interests at trial. The small claims court however did not rule on these requests.

In addition, there are other avenues available by which Zimmerman could prosecute his action without having to represent himself at the trial in the courthouse. See id. at 940. For example, he could submit the case to the court by documentary evidence or postpone the trial until his release from incarceration. See id. We are mindful that the statute of limitations governing Zimmerman's claim against the employees of the DOC may expire before Zimmerman is released from prison to prosecute his case in person. [Footnote omitted.] Thus, some means must exist by which Zimmerman can prosecute his claim while still incarcerated or else he would be denied his constitutional right to bring a civil action. A trial court should not be able to deprive a prisoner of his constitutional right to maintain a civil action by denying motions that the court can properly deny while concurrently ignoring the prisoner's requests for other methods that would allow the prisoner to prosecute from prison..

. . . .

DARDEN, J. concurs

BAILEY, J. concurs in result with separate opinion

I agree with the majority that the small claims court effectively denied Zimmerman his constitutional right to present his case in court, and as such the dismissal of Zimmerman's cause of action should be reversed. However, I write separately to address the appointment of counsel issue, specifically the majority's application of Sholes on this matter.

. . . .

[T]he small claims court was presented with a litigant that was "indigent" but yet equipped with "sufficient means" to prosecute his claim. . . .[W]ith access to a prison library, Zimmerman was able to present timely, coherent, even persuasive pleadings, in furtherance of his cause of action. . . .[T]he nature of Zimmerman's dispute was not complex, and his ability to effectively use the legal system was readily apparent. [Footnote omitted.] Therefore, I see no need to require the small claims court to provide special findings in support of a judgment that is plainly supported by the Record. I agree with the result of the small claims court's decision not to appoint counsel for Zimmerman; namely, that his action does not necessitate the expenditure of public funds. For the above reasons, I find the small claims court's order denying Zimmerman the appointment of counsel fully effecting the dictates of Sholes.

JUVENILE LAW ISSUE

J. V. v. STATE, No. 49A02-0108-JV-557, ___ N.E.2d ___ (Ind. Ct. App. Apr. 16, 2002).

BAKER, J.

J.V. does not attack the trial court's finding that A.S.'s videotaped statement met the criteria set forth above. Rather, he argues that the videotaped statement should not have been admitted because of the following language contained in the protected person statute: "[t]his section applies to a criminal action under the following: (1) Sex crimes (Ind. Code 35-42-4)." I.C. § 35-37-4-6. (Emphasis added). In addressing this argument, J.V. correctly asserts that juvenile proceedings are civil in nature and that an act of juvenile delinquency is not a crime. M.R. v. State, 605 N.E.2d 204, 207 (Ind. Ct. App. 1992). Nonetheless, a child alleged to be delinquent is charged by the State with an act that would be a crime if committed by an adult. The criminal standard of proof remains, in that the State must prove the delinquent act beyond a reasonable doubt to achieve a true finding of delinquency. Al-Saud v. State, 658 N.E.2d 907, 908 (Ind. 1995). Put another way, it is the child's age and not the status, nature or class of offense that removes the case from our adult criminal system. Moreover, our supreme court has observed that the goal of the protected person statute "is to reduce the child's emotional

trauma caused by numerous court appearances, not to guarantee that the child will never have to face the defendant." Miller v. State, 517 N.E.2d 64, 73 (Ind. 1987). [Footnote omitted.] Thus, we see no compelling reason to exclude application of the protected person statute in these circumstances, and we decline to read that statute so narrowly as to render the protected person statute inapplicable in delinquency proceedings. Thus, the trial court did not err in admitting A.S.'s statement on this basis.
DARDEN and SULLIVAN, JJ., concurred.

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